

**Methodist Hospital of Gary, Inc. and 1199 Indiana,
a Division of National Union of Hospital and
Health Care Employees, RWDSU, AFL-CIO.
Case 13-CA-20933**

August 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER

On March 2, 1982, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,¹ the General Counsel filed cross-exceptions and a supporting brief, and both parties filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,² and conclusions³ of the Administrative Law Judge and to adopt her recommended Order.

¹ Respondent has requested oral argument. Thereafter, the General Counsel filed an opposition thereto. Respondent's request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties. Additionally, Respondent has filed a "Motion to Reopen and/or Supplement the Record," together with supporting affidavits, in which it is alleged that there have been substantial changes since the hearing with regard to expansion of its facilities and increase in its personnel which would affect the decision herein. Thereafter, the General Counsel filed an opposition thereto. We hereby deny Respondent's motion as lacking in merit. Accordingly, we find it unnecessary to pass on the General Counsel's motion to strike the affidavits submitted by Respondent.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

In sec. II.D. of her Decision, the Administrative Law Judge inadvertently stated that the employee grievance committee election was held about 1 month before the date the Union planned to conduct its election for employee representatives to its bargaining committee. This inadvertent error is insufficient to affect our decision.

³ In adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) of the Act, we emphasize the facts that Respondent refused to permit the holding of an election, to be conducted by employees, of employee representatives to the Union's bargaining committee and that all bargaining unit employees were free to participate in the election. Additionally, we find it unnecessary to pass on whether Respondent's conduct would have violated the Act in the absence of discrimination. Further, in adopting the Administrative Law Judge's finding that Respondent's conduct was discriminatory, we rely solely on the fact that Respondent previously permitted a grievance committee election among its unrepresented employees to be held in its cafeterias during mealtimes.

Chairman Van de Water and Member Hunter, in agreeing with the Administrative Law Judge's finding that the Union had not waived the employees' right to use the cafeterias to conduct the bargaining committee election, find it unnecessary to pass on her reliance on *Gary-Hobart*

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Methodist Hospital of Gary, Inc., Gary and Merrillville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Water Corporation, 210 NLRB 742 (1974), enf'd. 511 F.2d 284 (7th Cir. 1975), cert. denied 423 U.S. 925.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge: This case was heard before me in Chicago, Illinois, on August 21, 1981, pursuant to a charge filed on March 13, 1981, and a complaint issued on April 17, 1981. The question presented is whether Respondent Methodist Hospital of Gary, Inc., violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein the Act), by refusing to permit the use of its cafeterias during the voters' nonworking time for the purpose of conducting an election, in which all unit members were eligible to vote, to select members of the contract negotiating committee for 1199 Indiana, a Division of National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (herein the Union), the unit employees' certified bargaining representative.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the helpful briefs filed by counsel for the General Counsel and by Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a not-for-profit corporation which operates two hospital facilities, one in Gary, Indiana, and one in Merrillville, Indiana. During the calendar or fiscal year preceding the issuance of the complaint, a representative period, Respondent's gross revenues exceeded \$250,000, and Respondent purchased goods and supplies valued in excess of \$50,000 which were directly shipped to its Indiana facilities from points outside Indiana. I find that, as Respondent concedes, Respondent is engaged in commerce within the meaning of the Act, and that exercise of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Refusal To Permit the Conduct in its Cafeterias of Elections To Select Employee Members of Union Bargaining Committee

Since December 29, 1978, the Union has been the certified collective-bargaining representative of Respondent's service and maintenance employees at Respondent's Gary (Northlake) and Merrillville (Southlake) hospitals. The union-security clause in Respondent's initial contract with the Union, effective between June 1979 and May 31, 1981, was inapplicable to employees who were on the payroll and were nonmembers at the time the contract was signed, and who never joined thereafter. About 625 employees are in the bargaining unit—400 at the Gary facility and 225 at the Merrillville facility. Of these employees, about 400–300 at the Gary facility and 100 at the Merrillville facility—were union members.

The initial collective-bargaining agreement between the parties was due to expire on May 31, 1981.¹ The Union decided to have all unit employees, rather than just members of the Union, participate in an election for an employee committee to negotiate a new collective-bargaining representative.

In late February, Tiney Ross, who is a full-time paid organizer for the Union, telephoned Respondent's personnel director, Karen Durso. Ross said that contract negotiations were soon to begin, and that she would like for Ross and John DiNicola, also a full-time paid union organizer, to come to "the cafeteria" and hold an election for a negotiating committee. Ross stated that they wanted to hold this election on March 3 between 11 a.m. and 1 p.m. and between 5 and 6 p.m.² Durso replied that she would "get back to" Ross. In late February, Ross telephoned Durso about a grievance. After discussing the grievance, Ross told Durso, "... you never got back to me yet, whether we could use the cafeteria." Durso said that she would get back to Ross that afternoon or the next day. Inferentially within this time frame, Durso's secretary telephoned Ross and said that she and DiNicola could not have the election "in the cafeteria."³

On March 2, following an arbitration meeting, Ross, DiNicola, Durso, and hospital attorneys Bruce Sayers and Edward Bergmann had a conversation outside the hotel conference room where the arbitration proceeding had been conducted. DiNicola asked why he and Ross

could not hold the election in "the cafeteria," and asserted that such elections had been held "down the street" in St. Mary's Medical Center without any problems. Durso replied that the election could not be held in the hospital cafeteria because it was "Contrary to hospital policy" and "because we do not want the employees to favor, to think we favor the Union," and that the Union could hold these elections at the union hall. Sayers started to say, "... well, maybe we can talk about it." Durso then asked him to talk with her in private, and they went into the conference room. When they came out, Sayers said that DiNicola and Ross could not hold the election in the cafeteria. DiNicola asked if "this was [Respondent's] intent with regard to the upcoming negotiations, that [Respondent was] taking a stand, because of that." Respondent replied that "it had nothing at all to do with that." DiNicola said that the Union would get the delegates (all of them employees of Respondent) to hold the election.⁴ Nothing further was said at that time about the election; the parties proceeded to discuss negotiation dates. In refusing to permit the Union to conduct an election, neither Durso nor Bergmann said that the reason the Union could not hold it was that Ross and DiNicola were going to be conducting it; nor is there any evidence that any other representative of management so stated.⁵

Thereafter, Ross and DiNicola telephoned the delegates and asked them to come in for a meeting, where they were given oral instructions about how to conduct the negotiating committee election. Also, Ross and DiNicola prepared the following flier under the Union's letterhead, and gave copies to the delegates at the meeting:

NEGOTIATING COMMITTEE VOTING

DATE: THURSDAY—MARCH 5, 1981

TIME: 11:00—1:00 P.M.

AND 5:00—6:00 P.M.

PLACE: CAFETERIA

VOTING FOR A NEGOTIATING COMMITTEE WILL TAKE PLACE THIS COMING THURSDAY, MARCH 5th. at THE HOSPITAL. THE VOTING WILL BE DONE DURING THE TIMES LISTED ABOVE. VOTES MAY ALSO BE CAST FROM 9:00 A.M. TO 5:00 P.M. AT THE ... UNION HALL AT 745 E. RIDGE ROAD IN GARY.

¹ All dates hereafter are 1981 unless otherwise stated.

² Gary employee Priscella Wilson testified without contradiction that the Gary cafeteria is open from 6:30 to 8:30 a.m., from 9:30 to 10:30 a.m., from 11 a.m. to 1:15 p.m., and from 4:30 to 6:15 p.m. Merrillville employee Johnnie Andrews, who works either from 7:30 a.m. to 4 p.m. or from 8 a.m. to 4:30 p.m., testified without contradiction that the Merrillville cafeteria is open from 11 a.m. to 1:30 p.m., from 2 to 4 p.m., and from 4:30 p.m. until "I don't know what time in the afternoon since I don't work then." The January 1980 grievance committee election (discussed *infra*) for nonunit employees was held in both cafeterias from 6:30 to 8:30 and 9:30 to 10:30 a.m., from 11 a.m. to 1:15 p.m., and from 4:45 to 6 p.m. Respondent's brief states (p. 7) that both cafeterias have the same hours of operation.

³ My findings in this paragraph are based on Ross' testimony. Durso gave essentially the same version of these conversations, but testified that the parties thereto were herself and DiNicola. For demeanor reasons, I credit Ross. However, the results herein would be the same if I credited Durso instead.

⁴ There are 11 Gary delegates and 6 Merrillville delegates, all of whom file employee grievances.

⁵ My findings in this paragraph are based on Ross' testimony and credible parts of Durso's testimony. Durso testified that Respondent denied the Union permission to hold the election at the hospital, and DiNicola said that the Union "would have the election anyhow," to which Respondent replied that "that would not be wise, since we had not granted permission to do so." Durso could not "recall" that anything was said about delegates. For demeanor reasons, I credit Ross. As described *infra*, attempts to hold elections were thereafter made by the delegates; and there is no evidence that Ross or DiNicola thereafter made any attempt on hospital property to engage in such activity. In any event, it is uncontradicted that the Union advised Respondent, through an admitted supervisor, Larry Mangold, that the scheduled elections were to be conducted by the delegates (see *infra*).

THE COMMITTEE ELECTED WILL BEGIN NEGOTIATIONS WITH [RESPONDENT] SOON FOR A NEW CONTRACT. WE NEED THE STRONGEST POSSIBLE REPRESENTATIVES TO SERVE ON THE NEGOTIATING COMMITTEE IN ORDER TO WIN THE BEST CONTRACT. CHOOSE WISELY. VOTES CAN BE CAST FOR PEOPLE ALREADY NOMINATED OR NEW PEOPLE CAN BE WRITTEN IN AT VOTING TIME.

BE SURE TO VOTE ON MARCH 5th. WE NEED YOUR FULL PARTICIPATION IF WE ARE TO WIN THE CONTRACT GAINS WE WANT. APATHY COSTS MONEY! ALL BARGAINING UNIT MEMBERS MAY VOTE. ONLY [UNION] MEMBERS CAN SERVE ON THE NEGOTIATING COMMITTEE.

This was the only notice distributed by the Union which detailed the voting procedure to mark ballots by employees.

Pursuant to the 1979 bargaining agreement, a union bulletin board was maintained at each facility. On March 4, Gary employee Priscella Wilson, a delegate, posted a copy of this leaflet on the Gary union bulletin board. Thereafter, without any instructions from Wilson, the document was removed. About that same day, Larry Mangold, who is Respondent's assistant director or administrator and is admittedly a supervisor within the meaning of the Act, telephoned Ross and asked her to call off the election scheduled for the following day. Ross replied that she could not, and that the delegates were running the election. Mangold replied, "... that doesn't matter ... we took your leaflet down ... you are going to call it off, because we could negotiate on that negotiation time." Ross refused, and said that he would do what he had to do and she would do what she had to do.

Also on March 4, Merrillville employee Johnnie Andrews, a delegate, posted a copy of this leaflet on the Merrillville union bulletin board. On March 5, a few minutes before the election was scheduled to begin, a security guard pulled down the Merrillville leaflet, looked at it, and threw it in the garbage.

Shortly before the Gary election was scheduled to begin, employee Mary Wilson, who had been scheduled to conduct that election with Priscella Wilson and to bring pens and pencils for the voters to use, advised Priscella that Mary had been "instructed not to perform the election, because we both would be suspended on the spot."⁶ Nonetheless, a few minutes before the election was scheduled to begin, Priscella Wilson headed for the cafeteria, carrying with her a plain brown manila envelope which contained the ballots to be used. At the entrance to the cafeteria, she saw three security guards; their presence there at that time was very unusual. As Wilson went into the cafeteria, she saw Personnel Director Durso sitting at a cafeteria table on which was a dietary chart. Chief Security Officer Gore was asking Durso and security officer McBride whether the chart

"was it." Wilson approached them, showed them the manila envelope containing the ballots, and asked whether that was what they were looking for. Then, she asked Gore whether he would suspend her now. McBride told her no, that she could go.

Employee Andrews went into the Merrillville cafeteria on March 5 to conduct the election. This was the regular day off for Andrews, who is a darkroom technician, and she was wearing street clothes with her hospital identification badge visible.⁷ She was carrying with her a shoebox, which was to be used as a ballot box and bore the Union's name, and the ballots to be used. Andrews was approached by Joe Szczebra, Respondent's assistant director of security. Andrews identified herself, and he asked whether she was there to hold the "elections of the Union." When she said yes, he told her that she was "unable" to hold the election in the cafeteria. She showed him a union leaflet which stated, *inter alia*, that employees had the right under the Act to "distribute Union literature on nonworking time and in all nonworking areas of the hospital, such as cafeterias ... even if patients and visitors have access to these areas."⁸ He replied that she had the right to distribute leaflets but not to hold the election in the cafeteria. She said that she was waiting for another employee, Marion Epps, to come down and be with her. When Epps arrived, Szczebra told her the same thing, and said that the two women could use his telephone to call personnel. They used his telephone to try to call union organizer Ross, but were unable to reach her. Andrews then left the premises.

The ballots used by the Union were headed "Ballot for Election of Negotiating Committee" and were divided into eight parts, each captioned by the name of a particular hospital department. Under each such heading were listed one to four names and a blank space with the entry "(or write in name)" underneath. A box followed each name and each blank space. An employee was supposed to vote only for one candidate (printed or write-in) to represent the voter's own department. No such written instructions were issued to the employees. Employee delegate Priscella Wilson testified that she and Mary Wilson would have answered questions from any voters about how to mark the ballots, but Priscella Wilson gave confusing testimony about how ballots were to be marked.⁹

The election was eventually held on March 17 at the union hall. The polls were open all day. The union hall is 15 to 30 minutes away from each of the hospital facilities. Of the approximately 625 eligible voters, 58 voted, perhaps including "a very small amount" of nonmembers. The area within which Respondent's employees live approximates a quadrilateral with three 15-mile

⁷ The record fails to show whether Respondent permits employees to come into the hospital on shifts other than their regular shift.

⁸ The face of this leaflet indicates that it was printed in June 1976. Cf. *N.L.R.B. v. Baptist Hospital, Inc.*, 442 U.S. 773 (decided June 20, 1979, after the effective date of the parties' 1979-81 agreement). The leaflet further states that off-duty employees have the right to organize inside the hospital in nonworking areas unless the hospital denies entrance to all off-duty employees for all purposes.

⁹ For example, her testimony is unclear as to whether write-in candidates had to be from the department they were supposed to represent.

⁶ This finding is based on Priscella Wilson's testimony, received without objection on hearsay grounds.

sides and one 20-mile side. Gary is in about the middle of the longest (north) side of this area, and Merrillville is about one-third of the way along a diagonal from the southwest to the northeast corner.

Thereafter, the Union conducted a strike vote election, in which only members were eligible to vote. The election for Gary members was held in Ross' van, which she parked on the street in front of the Gary facility. "A lot" of people voted in this manner. The strike vote election for Merrillville members was held at the union hall.

The Union conducts at the union hall monthly meetings for the delegates and a meeting every 4 to 6 weeks for the general membership. Ordinarily, about half the delegates attend delegates' meetings, and 25 to 30 employees attend general membership meetings. When the Union conducted an election in the spring of 1981 to ratify the collective-bargaining agreement, in which election only members were eligible to vote, more than 370 members came to the union hall to vote. Ross testified that this election, which was held between 11 a.m. and 6 p.m., would have caused disruption if held at the hospital, "because it was a lot of people there." The 1979 election for employee members of the bargaining committee was not conducted at the hospital, and was likely conducted at the union hall. The record fails to show how many employees voted in that election.

The 1979-81 agreement provided, *inter alia*:

Union Activity, Visitation and Bulletin Boards

1. . . . Union literature shall not be distributed during working time nor at any time in any patient care or treatment area nor in any working area.

2. A representative employed by the Union shall have reasonable access to the Employer for the purpose of conferring with the Employer, delegates of the Union and/or employees, and for the purpose of administering this agreement. . . .

3. The Employer shall provide Bulletin Board(s) which shall be used for the purpose of posting proper Union notices. Such Bulletin Board(s) shall be placed conspicuously and at places readily accessible to workers in the course of employment.

During the negotiations leading up to this contract, company attorney Bergmann stated that the cafeteria, the outside entrance of the hospital, and any nonpatient care area could be used as union distribution areas. During the negotiations leading to the contract effective on June 1, 1981, during which negotiations the instant charge was pending, the Union requested contractual provisions to prevent a repetition of the incidents where the Union's notices of the scheduled March 5 election had been removed from union bulletin boards. Also, the Union proposed a contract provision permitting the use of Respondent's cafeterias for union elections, at least for bargaining committee members; the record fails to show whether this proposal was directed to the conduct of such elections by nonemployee union representatives, employees, or both. The 1981-83 contract contains no provisions permitting any such use of the cafeterias. The quoted provisions of the 1979-81 contract were inserted without change in the 1981-83 contract, except that to

paragraph 3 was added the sentence, "The Employer does not condone the removal, defacing, or destruction of proper union notices."

B. Election and Other Activities in Respondent's Cafeterias

At the time of the August 1981 hearing, Respondent's total Gary work force consisted of 1,300 persons, of whom 900 were not in the bargaining unit; and its total Merrillville work force consisted of 650 persons, of whom 425 were not in the bargaining unit. As to nonbargaining unit hourly employees, there exists what Respondent describes as a "Grievance Committee" of nine such employees. All nonbargaining unit hourly employees are eligible to vote for such committee members in elections which are conducted every 2 years. Such an election was conducted in Respondent's cafeterias on January 31 and February 1, 1980, from 6:30 to 8:30 a.m., 9:30 to 10:30 a.m., 11 a.m. to 1:15 p.m., and 4:45 to 6 p.m. A memorandum from Personnel Director Durso instructed the employees to present their respective "ID," sign the "poll book," accept and mark their ballots, and put them in the ballot box. Frances Taylor, who is Respondent's vice president of personnel and education, testified in August 1981 that she did not think the 1982 grievance committee elections could be held in "the cafeteria" (I am unclear whether she meant both), but I have some reservations about the value of her opinion in this connection.¹⁰

Respondent also conducts annual credit union registration and Christmas club membership drives during lunch periods in its Gary cafeteria. A credit union representative sits at a table, on which application blanks have been placed, to answer employee questions and assist employees in filling out applications. These drives have lasted from 2 days to a week.

As in prior years, in July 1981 Respondent gave its Gary employees, with their paychecks, slips for a door prize drawing at Respondent's annual picnic. Employees sign the slips and drop them in a box placed on a table or chair in the cafeteria. The box may remain in the cafeteria for a month.

For a number of years before about early August 1981, volunteer workers and X-ray student technicians each held annual bake sales in the Gary and Merrillville hospitals. The record fails to show what was done with the proceeds of these bake sales. The July 1981 Gary volunteers' bake sale began at 8 a.m. and extended through the lunch hours. The Merrillville X-ray student technicians' 1980 bake sale was held between 9:30 and 11 a.m. The record otherwise fails to show the precise hours when the bake sales were conducted. The Gary bake sales were conducted from one or two card tables put where Priscella Wilson planned to put up a table from which to

¹⁰ Taylor testified that the Merrillville facility would be adding new patient care beds, which could require the hiring of 300 new employees, but that the cafeteria at that facility would not be expanded. However, the food service director, Marcella Stewart, whom I find to be a wholly credible witness, testified that she and Hospital Vice President Defkowsky were working out a plan to accommodate the anticipated work force increase by removing a movable wall which separates the Merrillville cafeteria from the doctors' dining room, and adding more tables.

conduct the election, and "sometimes" interfered with the flow of traffic. The volunteers' July 1981 bake sales caused congestion in the Merrillville cafeteria. Shortly thereafter, the X-ray student technicians asked permission to hold a fall 1981 bake sale. This request was denied.

Almost every day, salespeople discuss business with hospital representatives in the Gary cafeteria during lunch hour. Also, supervisors conduct meetings in the Gary cafeteria, and Respondent's "work units" have meetings in that cafeteria. Priscella Wilson credibly testified that every month the supervisor of her "work unit," which consists of 12 people, conducts a meeting in the Gary cafeteria at which attendance is mandatory. She further credibly testified that an attempt was made to have such meetings after the lunch period "Because of the congestion, and we think about other people eating lunch. We are not there to eat. We are only there to discuss, so we try to be out if we can, but if we can't, then we are there."

C. The Physical Layout of Respondent's Facilities and the Union's Plans for Conducting an Election in the Cafeterias

Respondent's hospitals are staffed around the clock, 7 days a week, by three shifts of employees. Respondent's Gary facility is located in an urban area surrounded by apartment buildings in the process of renovation, a family practice medical center also operated by Respondent, homes, and congested streets. The Gary facility consists largely of two separate buildings connected by an enclosed hallway at the basement and first-floor levels. The Merrillville hospital is located in a rural area with an interstate highway passing nearby.

The only persons permitted in the two hospital facilities are patients, employees, physicians, salespeople, and persons who have come to visit patients. Visitors are issued passes, are permitted to visit during certain hours only,¹¹ and (at least in the Gary facility) are requested to limit their visits to 20 minutes. All employees are supposed to wear identification badges, and many of them also wear uniforms. Employees have been requested to advise the security department if they observe unauthorized personnel in the buildings. Security guards are stationed at the main entrance to the Gary hospital and at the emergency room entrances to both hospitals. There is direct evidence that guards patrol the grounds of both hospitals and the Merrillville cafeteria. I infer that, at least on occasion, guards also patrol much or all of the interior of both hospitals, including the Gary cafeteria.¹²

The Gary cafeteria is located in the basement. Near the cafeteria are the dishwashing rooms, women's and men's restrooms and locker rooms, a medical records room, a pharmacy, an IV team area, central services where sterile supplies are stored, and other nonpatient care areas. The cafeteria can seat 100 to 200 patrons at a time. About 125 persons a day eat breakfast there (breakfast service lasts for a total of 3 hours); about 450 per-

sons a day eat lunch there during a 2-1/4-hour period, with the busiest period being noon to 12:30 p.m.;¹³ and about 150 persons a day eat supper there during a 1-3/4-hour period. Employees generally receive a half-hour for lunch and are "docked" if they overstay their lunch period. There are no restaurants within walking distance of the Gary hospital. During the lunch period, practically all the tables are occupied, but there is no evidence that patrons must ever wait to be seated.

About 80 percent of the people who eat in the Gary cafeteria are employees. Employees at both hospitals are required to obtain their supervisors' permission to leave the hospital building during their lunch break. Employees at both hospitals are required to eat their meals (including brown bag lunches brought from home) in "designated eating areas," which in the Gary facility consist only (so far as the record shows) of the cafeteria, a privately managed coffeeshop where the prices are significantly higher than in the cafeteria and which (inferentially) does not permit persons to eat brown bag lunches there, and kitchens in buildings apart from the main hospital (administration center, media center, and personnel). Gary employees prefer the cafeteria to the coffeeshop because the cafeteria gives them a discount on meal prices. Patients are required to obtain a written physician's order before they are permitted to eat in the Gary cafeteria. Patients who eat in the Gary cafeteria tend to sit together, but might sit with employees and visitors. An average of 10 patients eat in the cafeteria at any one time. The patients who use the Gary cafeteria are ambulatory care clinic patients, some of whom are pregnant, patients from the children's clinic, rehabilitation patients, and psychiatric patients. The psychiatric patients who eat in the Gary cafeteria do so because their doctors think that exposure to such a situation will help them to return to the mainstream of community life. The maximum number of psychiatric patients at the Gary hospital is about 28, and the hospital is not a long-term psychiatric care facility.

Except for the food line area, the Gary cafeteria consists of a rectangular room 32.5 by 24.5 feet. Part of this room consists of a walled-off doctors' dining area, about 7 by 10 feet, in one corner of the room, and an adjacent vestibule area about 7 by 6 feet. At the other end of the room, and abutting the food-line area, is an area (herein called the service area) which extends the complete breadth of the room and, for the most part, is 7 or 8 feet wide. The northern portion of the service area contains a salad bar. The southern portion of the service area is described below. The rest of the room is an open dining area.¹⁴

Patrons enter the Gary cafeteria, move through a food line, and pay for their purchases at one of two cash registers, one of which is located in the south service

¹¹ In the Gary facility, visiting hours are from 2:30 to 8 p.m. The record fails to show the visiting hours at the Merrillville facility.

¹² As previously found, guards were in both cafeterias when the union delegates went there in order to conduct the election.

¹³ My finding as to the busiest period is based on the testimony of Food Service Director Hunt, whom I regard as more knowledgeable in this connection than Gary pharmacy technician Wilson.

¹⁴ A plan received into evidence suggests that the dining area is divided into two separate parts by a partitioned-off aisle. However, no such partitions in fact exist.

area.¹⁵ After paying for their purchases, patrons proceed to the dining area, containing tables of varying sizes which can accommodate 6 to 12 persons, to eat their meals. The tables are 3 to 4 feet apart. After a patron has finished eating, he is expected to proceed to the south service area and return his tray to a tray conveyor belt on the south wall and/or deposit his trash in one of two receptacles in front of the west end of the tray belt. In addition to the tray belt, trash containers, and cash register, this area contains to the west of the register a pop and a snack vending machine on the west wall and near the food line, and to the east of the cash register, an ice cream machine and ice station. The south service area is about 10 feet long and extends about 8 feet east into what is otherwise the dining area, except that the ice cream machine and ice station extend about 12 feet into the dining area. The south service area can be reached from the dining area either by walking toward the cash registers and then making a left turn just before or just after the left-hand cash register, or (inferentially, a more likely route) by walking through the dining area and then to the left of the ice cream machine, which is about 8 feet from the tray belt. Patrons may exit where they entered or by means of a door which can be reached by walking the length of the dining area. In conducting the election, the Union intended to set up a card table in the south service area near a blank 7-foot wall which is at right angles to the tray belt and extends to the vending machines placed against that wall. After employees placed their trays on the tray belt and/or discharged their trash, they could approach the delegates seated at the card table and obtain a ballot which they would mark next to the printed or written-in name of one candidate and deposit in a box. On various occasions between May 1979 and the day before the hearing on August 21, 1981, union organizer Ross and/or union delegates have distributed union literature in the Gary cafeteria with management's knowledge. Ordinarily, such literature is distributed from a table which the Union places at the same location where it planned to put up a card table for conducting the election.

The only area in the Merrillville hospital where employees are permitted to eat lunch is the cafeteria, which is on the ground floor in the older of the two wings.¹⁶ Ninety-five percent of the employees and volunteers eat in the cafeteria, and they comprise 95 percent of the cafeteria patrons. Patients do not eat in the Merrillville cafeteria. Inferentially, the nonemployee/volunteer patrons are physicians, sales people, and people who have come to visit patients.

Merrillville cafeteria patrons enter the cafeteria by means of one of three doors which can also be used as exits, move along a line where they pick up their food, pay for it at a cash register at the end of the line, and then make a right turn into the dining room. This room

is 61 feet by 58 feet, but at the time of the hearing an area about 12 feet wide was separated from the rest of the dining room by means of a movable partition extending almost the full width of the room, and was being used as a doctors' dining room. This partitioned-off area aside, at the time of the hearing the dining room contained about 35 tables, which accommodated from 2 to 6 patrons each, and had a total capacity of about 130 patrons. The aisles between the tables are 3 to 4 feet wide. About 100 persons a day eat breakfast there, about 300 persons a day eat lunch there, and about 130 persons a day eat supper there.¹⁷ The cafeteria's busiest period is noon to 12:30 or 1 p.m. Even during such periods, seats and some tables are always vacant.

Andrews planned to conduct the election from a four-person table on the far side of the room from the aisle which leads from the cash register, and about four-fifths of the distance between the tray line and the partition which separates the doctors' dining room from the main dining room. Both Andrews and union organizer Ross have distributed union literature in the Merrillville cafeteria; in at least Ross' case, in the presence of and with the knowledge of supervisors and Director of Personnel Durso. Andrews, whose normal lunch period is 12:30 to 1 p.m., distributed such literature from the table where she was eating.

The Merrillville cafeteria is surrounded by a separate vending machine room, the women's lounge, the purchasing department, the central services department, men's and women's locker rooms, and other nonpatient care areas.

The cafeteria rooms aside, there is no evidence that there are any rooms in either hospital where the union elections here at issue could have been conducted. The locker rooms are too small and congested for such purposes, and are separated by sex. Respondent asserts in its brief (p. 43) that as to the activities (other than the credit union and Christmas club drives) which Respondent has permitted in its hospitals, "there was no other available facility for the other activities to be conducted."

D. Analysis and Conclusions

Whether employees may use their employer's premises to conduct intraunion elections is not a matter wholly within the employer's discretion. Rather, an employer violates the Act if he is improperly motivated in denying permission for such use. *Vulcan-Hart Corporation (St. Louis Division)*, 248 NLRB 1197 (1980), remanded 642 F.2d 255 (8th Cir. 1981), on remand 257 NLRB 979 (1981). I conclude that Respondent's refusal to permit the Union to use Respondent's cafeterias to conduct an election for bargaining committee members was rendered unlawful by Respondent's motives therefor. The only reason Respondent ever gave the Union or the employees for such a refusal was Personnel Director Durso's statement to Union Representatives Ross and DiNicola that the Union could conduct an election at the union hall, permitting such an election in the cafeteria was "Contrary to hospital policy," and "because we do not

¹⁵ The second cash register was installed at the Union's instance, shortly after the first collective-bargaining agreement between the parties was negotiated in 1979, because members of Respondent's safety review committee, comprised of individuals from both hospital facilities, were delaying employees moving through the cafeteria line on Tuesdays, when the committee met.

¹⁶ Some employees eat in the courtyard. However, I infer that they would likely not choose to do so in northern Indiana in early March.

¹⁷ As to the hours of service, see *supra* at fn. 2.

want the employees to favor, to think we favor the Union." Moreover, about a month before the date on which the Union wanted to hold bargaining committee elections in Respondent's cafeterias, Respondent not only permitted the meal-hour conduct in its cafeterias of an employee election for members of the grievance committee, but also affirmatively urged employees to vote in that election. Like the Union, the grievance committee was a labor organization within the meaning of Section 2(5) of the Act;¹⁸ and, moreover, the grievance committee was the organization to which the employees in the certified unit would look for grievance representation if and when they were no longer union represented. I note, moreover, that Respondent has also permitted drawings, bake sales, credit union drives, and sales conferences in its cafeterias during mealtimes, and has conducted "work-unit" conferences there during such periods. I conclude that by permitting (and, indeed, encouraging) the conduct in the cafeterias during meal hours of grievance committee elections (as well as permitting other activities unrelated to meals), while denying union-represented employees permission to conduct an election for bargaining committee representatives, Respondent acted out of improper motives and, therefore, violated Section 8(a)(1) of the Act. See *N.L.R.B. v. The Babcock & Wilcox Company*, 351 U.S. 105, 112 (1956); *N.L.R.B. v. Stowe Spinning Company*, 336 U.S. 226, 227-232 (1949); *Citizen-News Company, Inc.*, 88 NLRB 1413 (1950); *Vulcan-Hart, supra*, 248 NLRB 1197; *Challenge Cook Brothers of Ohio, Inc.*, 153 NLRB 92, 99 (1965), *enfd.* in material part 374 F.2d 147, 152-153 (6th Cir. 1967).

Respondent's brief contends that a meal-hour election in the cafeterias for bargaining-committee representatives would have disrupted the cafeterias' operations; could have adversely affected the patients,¹⁹ visitors, and businessmen who eat in the cafeterias; and could have caused Respondent to violate the collective-bargaining agreement, which requires Respondent "to take measures where necessary to assure that Employees can move through the cafeteria line and eat" within their half-hour meal period. The difficulty with this contention is that Respondent never advanced such explanations to the Union or to the employee delegates as reasons for denying the employees permission to conduct the election. Moreover, if Respondent's management had expressed such reservations when the Union requested such permission several days before the proposed elections but had evinced willingness to consider granting permission if

these difficulties had been obviated, the union delegates might well have worked out election procedures which would not have presented the risks which counsel now alleges. So far as the record shows, the grievance-committee election, with an eligibility list more than double the number eligible to vote for bargaining committee members, had proceeded smoothly.²⁰ The delegates might (for example) have given more informative and more timely written notices about election procedures if Respondent had expressed to the Union at the time the opinion advanced 6 months later in its brief to me—namely, that the grievance committee election had been better planned than the proposed bargaining committee election because the grievance committee election had been preceded by "written notices explaining who would vote, how to vote, where and when to vote and who could be voted for" (br., p. 35). Instead, the notices which the Union drew up, and which Respondent (so far as the record shows) never criticized to the Union on the ground that they were belated or vague, were removed from the union bulletin board, at least in one instance by a hospital guard, and Supervisor Mangold told Union Representative Ross that "we took your leaflet down."

Finally, Respondent contends that granting permission for such an election might have exposed it to an unfair labor practice complaint. This consideration did not deter Respondent from giving permission for the conduct of the grievance committee election. Moreover, the Union, unlike the grievance committee, is a Board-certified representative, and Respondent admittedly does not want to appear to favor it. Under these circumstances, Respondent was free to permit the intraunion election if Respondent so chose. *Sunnen Products, Inc.*, 189 NLRB 826 (1971); *Hesston Corporation*, 175 NLRB 96 (1969); *Coamo Knitting Mills, Inc.*, 150 NLRB 579, 582 (1964).

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union and the grievance committee are each labor organizations within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(a)(1) of the Act, thereby engaging in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7), by refusing to permit employees to conduct in its cafeterias, during mealtimes, an election for bargaining committee representatives in which all bargaining unit employees were eligible to vote.

THE REMEDY

Respondent contends that no remedial order should be issued in the instant case even if I find (as I have) that Respondent violated the Act by its March 1981 refusal to permit employees to use Respondent's cafeterias

¹⁸ I so find because employees participated therein by acting as and voting for committee members, and because the grievance committee exists at least partly for the purpose of dealing with Respondent concerning grievances. *N.L.R.B. v. Cabot Carbon Company*, 360 U.S. 203 (1959); *Thompson Ramo Wooldridge, Inc.*, 132 NLRB 993, 994-995 (1961), modified 305 F.2d 807 (7th Cir. 1962). My finding as to the committee's purpose is based on the following circumstances and inferences therefrom: Respondent describes the committee as a "grievance committee," cautions prospective candidates (all of whom must be nonmanagement personnel) that the responsibilities of committee members require them "to review and be very familiar with policies of the hospital so they will be able to wisely counsel employees in grievance matters," and urges employees to vote for "your committee." Also, a particular number of committee members are to be elected from each department in each hospital.

¹⁹ As previously noted, it is undisputed that patients do not eat in the Merrillville cafeteria.

²⁰ The grievance committee election took 2 days. The bargaining committee election was supposed to take only 1 day, but employees could also have voted at the union hall. Moreover, Respondent never suggested that the bargaining committee election be held on 2 days instead of only 1. Employee/delegate Priscella Wilson indicated that she would have been agreeable to a 2-day election.

during mealtimes to conduct an election for employees to serve on the bargaining committee. Respondent contends that the June 1, 1981 through May 31, 1983, bargaining agreement effectively waived any right the employees may have had to use the cafeterias for this purpose. I agree with Respondent that such a right is so waivable. See *Magnavox Company of Tennessee*, 195 NLRB 265, 266, fn. 9 (1972), enforcement denied 474 F.2d 1269 (6th Cir. 1973), court of appeals reversed 416 U.S. 322 (1974); *Vulcan-Hart, supra*, 642 F.2d at 257, enfg. 257 NLRB 979. However, such a waiver could not limit the employees' rights before the effective period of the contract, nor could it indefinitely limit their rights after the contract has expired. Moreover, such an effective waiver can be found only on a clear and unmistakable showing that the waiver occurred. *Gary-Hobart Water Corporation*, 210 NLRB 742, 744 (1974), enfd. 511 F.2d 284 (7th Cir. 1975), cert. denied 423 U.S. 925; *Texaco, Inc.*, 259 NLRB 1217 (1982). Respondent's waiver claim is based only on the failure of the 1981-83 contract to include a provision affording use of company property for union election purposes, although the Union had requested such a provision. However, it is unclear from the record whether the Union proposed that the employees be afforded such use, or whether the Union's proposal requested that such use be permitted to outside union representatives. In any event, a union does not effectively waive a statutory right merely by presenting a proposal for its contractual guarantee and thereafter signing a contract which fails to include such a guarantee. See *Texaco, Inc., supra*. Accordingly, a cease-and-desist and notice posting order will issue. In framing the order and notice, I have followed the guidance of *Vulcan-Hart, supra*, 257 NLRB 979.²¹

Upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²²

The Respondent, Methodist Hospital of Gary, Inc., Gary and Merrillville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to give its employees permission to use its cafeterias during mealtimes to conduct an election for employee members of the bargaining committee which is to represent 1199 Indiana, a Division of National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, in negotiations with Respondent, where such permission to conduct elections is granted to nonbargaining unit employees in connection with grievance committee elections or intraunion elections for any other labor

²¹ Respondent's answer, filed in April 1981, requests attorney's fees under the Equal Access to Justice Act (P.L. 96-481, 94 Stat. 2325). Under Sec. 102.148 of the Board's Rules and Regulations, effective October 1, 1981, such a request is to be filed with the Board and not with me, and is not to be filed until after entry of "the final order." Accordingly, at this point in the proceeding I shall not entertain Respondent's request.

²² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

organization, or where refusal of such permission to 1199 Indiana is motivated by any element of union animus; but nothing in this order shall require Respondent to give such permission to 1199 Indiana if and when (1) 1199 Indiana is no longer the bargaining representative for the employees; (2) the right to use the cafeterias is modified by the parties as a result of collective bargaining between 1199 Indiana and Respondent; or (3) such use is denied by Respondent for any legitimate nonpretextual reason which does not involve any element of union animus or discrimination between labor organizations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its Gary, Indiana, and Merrillville, Indiana, facilities copies of the attached notice marked "Appendix."²³ Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

²³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to give employees permission to use our cafeterias during mealtimes to conduct an election for employee members of the bargaining committee which is to represent 1199 Indiana, a Division of National Union of Hospital and Health Care Employees RWDSU, AFL-CIO, in negotiations with us, where such permission to conduct elections is granted to nonbargaining unit employees in connection with grievance committee elections or intraunion elections conducted by any other labor organization, or where refusal of such permission to 1199 Indiana is motivated by any element of union animus. However, we need not afford such permission to 1199 Indiana if and when:

(1) 1199 Indiana is no longer your duly recognized bargaining representative.

(2) The right to use the cafeteria is modified by the parties as a result of collective bargaining between us and 1199 Indiana.

(3) The use of the cafeterias is denied by us for any legitimate, nonpretextual reason which does not involve any element of union animus or discrimination between labor organizations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the National Labor Relations Act.

METHODIST HOSPITAL OF GARY, INC.